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CHARLES ELMORE CROPLEY

CLERK

Lee Jennette, Appellant

v.

W. R. Wilson, as Director of the Division of Licensing of the State of South Dakota, et al., Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF APPELLANT OPPOSING STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL


Ashley Sellers,
W. E. Danforth,
Kenneth L. Kiesel,
*Counsel for Appellant*



Press of Judd & Detweiler, Inc., Washington, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947

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No. .....

LEO SCHMITT, *Appellant*

v.

W. R. WILDER, as Director of the Division of Licensing of the State of South Dakota, et al., *Appellees*

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*APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA*

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## BRIEF OF APPELLANT OPPOSING STATEMENT OF APPELLEES IN OPPOSITION TO NOTING JURISDICTION ON APPEAL

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The appellees have filed a statement wrongly opposing the jurisdiction of this Court.

1. Appellees argue that the federal questions which appellant seeks to have reviewed have been disposed of in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, and other decisions of this Court. We have discussed this point at length in our statement as to jurisdiction, heretofore filed, and believe it is there satisfactorily demonstrated that the questions involved are substantial.

2. Appellees assert that this Court is bound by and cannot review the holdings of the Supreme Court of South Dakota to the effect that (a) the purpose of the statute in question is to raise revenue and not to prohibit the sale of oleomargarine,

and (b) the legislative history of the statute cannot be considered in determining the purpose of the legislature in enacting it. These assertions are clearly invalid. In a case such as this, decision on the issue of validity turns on the question of legislative purpose. If appellees were right, the statutory right to Supreme Court review of state court decisions sustaining state statutes of this kind against attack on the ground of repugnancy to the Federal Constitution would be completely nullified. This Court has frequently held that "neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect." *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625 (where this Court concluded that the object of a state tax was invalid both from the face of the statute and from its legislative history, in the form of a report of a special committee appointed by the legislature to investigate the subject of taxation); *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280; *Harvester Co.* v. *Dept. of Taxation*, 322 U. S. 435, 441.

3. In our jurisdictional statement we distinguished the *Magnano* case on the ground, among others, that there the trial court had not found, as it has here, that the statute had been directly responsible for the destruction of all the oleomargarine business in the state. Appellees dispute this distinction, asserting that it was stipulated at the *Magnano* trial that no oleomargarine sales had been made in the state since passage of the statute. It was so stipulated. But the point is that there the parties seriously disagreed as to the reason for

the cessation of sales, the trial court did not find that the statute had been the cause, and in fact it concluded that the complainant had failed to prove that the statute was prohibitive. *A. Magnano Co.* v. *Dunbar*, 2 F. Supp. 417, 423 (W. D. Wash.). Here the finding is to the contrary, as appellees concede.

4. Appellees state that the trial court's finding in the case at bar that the statute had been directly responsible for the destruction of all oleomargarine business in South Dakota "is wholly unsupported by any evidence," and they assert other reasons for that result. We think that the trial court's finding is fully supported by the evidence. In any event, if the Court is to decide this question, it must take jurisdiction and hear argument.

5. Appellees contend that the courts may not consider legislative history in determining legislative purpose. This Court has held the contrary. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 632-633. See also the discussion and cases cited at end of our statement as to jurisdiction.

6. Appellees argue that, if there was any inherent weakness in this statute when originally enacted in 1931, it has been cured by re-enactment of the provisions in the South Dakota Code of 1939. Presumably this argument is directed to the right of the courts to consider the legislative history of the original enactment. Obviously, however, it is the legislative purpose at the time of original enactment, and consequently the legislative history bearing on that purpose, which are significant here. Cf. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205, 212-213; *Anderson* v. *Pacific Coast S.S. Co.*, 225

U. S. 187, 198-199; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, footnote at 27-29.

7. Appellees challenge the finding of the trial court that, while there were some oleomargarine sales in the state after the entry of the United States into the war and rationing, those sales would subside after rationing was lifted. We believe that the trial court was justified in basing its conclusion as to the effect of the statute on the normal period from 1931 to the beginning of the war, rather than on the unusual war period. Moreover, if this Court is to consider the significance and accuracy of this finding, presumably it must take jurisdiction and hear argument.

We submit that the questions involved are substantial, and that this Court should note probable jurisdiction.

Respectfully submitted,

ASHLEY SELLERS,
W. R. DANFORTH,
KENNETH L. KIMBLE,
*Counsel for Appellant*